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Issue Date: 06 April 2006

CASE NOS.: 2005-LHC-00169
2005-LHC-00957

OWCP NOS.: 01-157280
01-148538

In the Matter of

PATRICK W. CROWLEY
Claimant

v.

LOGISTEC OF CONNECTICUT, INC.
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest[1]

Appearances:

Gerard R. Rucci, Esquire, New London,
Connecticut, for the Claimant

Peter D. Quay, Esquire (Murphy & Beane), New London,
Connecticut for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

[1] The Director, OWCP, which is an interested party in view of the Employer's application under 33 U.S.C. § 908(f) for liability relief from the Special Fund, did not appear at the hearing and has not participated in proceedings on the claims before the Office of Administrative Law Judges. *See* Administrative Law Judge Exhibits 11 and 21 (letters from the Office of the Solicitor of Labor, which represents the Director, OWCP, stating that the Director did not wish to participate in the hearing).

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This case represents the third round of litigation between Patrick W. Crowley (the Claimant) and Logistec of Connecticut, Inc. (Logistec) over the Claimant's entitlement to workers' compensation benefits under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the LHWCA). In round one, the parties stipulated and agreed that the Claimant was entitled to a period of temporary partial disability compensation from August 24, 2000 through February 8, 2001 and 14.64 weeks of permanent partial disability compensation based on a three percent permanent loss of the use of each hand. *Crowley v. Logistec of Connecticut, Inc.*, Case No. 2001-LHC-02420 (ALJ Dec. & Ord. July 25, 2003) (*Crowley I*). The sole issue in that case was the amount of the Claimant's average weekly wages for calculating the amount of his temporary partial and permanent partial disability compensation. Determination of the applicable average weekly wage was controversial because the Claimant had worked two jobs – (1) his primary occupation as a mental health worker/counselor for First Step, a social service agency for patients with psychiatric disabilities, and (2) moonlighting for Logistec as a longshoreman at the state pier in New London, Connecticut. *Crowley I* at 2. At the time of the hearing, the Claimant had not worked as a longshoreman since August 24, 2000 though he continued in his regular job with First Step. *Crowley I* at 2-3. This court applied section 10(c) of the LHWCA to arrive at an average weekly wage determination of $330.04 for the Claimant's work at Logistec which produced the $220.03 compensation rate for the period of temporary partial disability. *Crowley I* at 5-6. The award of permanent partial disability compensation for the Claimant's work-related permanent partial loss of the use of his hands was based on the combined average weekly wages ($848.37) from both the First Step and Logistec jobs. *Crowley I* at 7.

In the second case to come before the Office of Administrative Law Judges (OALJ), the Claimant sought an award of continuing temporary partial disability compensation as he had not been able to return to work at Logistec. *Crowley v. Logistec of Connecticut, Inc.*, Case No. 2003-LHC-833 (ALJ Dec. & Ord. Jan. 15, 2004) (*Crowley II*). In that proceeding, Judge Colleen A. Geraghty found that the Claimant had established that he suffers from bilateral rotator cuff tendonitis or impingement syndrome that is causally related to his employment at Logistec and that this injury, in part, contributed to the Claimant's inability to continue working at Logistec. *Crowley II* at 7-9. Judge Geraghty then rejected Logistec's "double recovery" argument that the Claimant could not be awarded temporary partial disability compensation for any period when he also received permanent partial disability compensation pursuant to *Crowley I*, and she awarded the Claimant continuing temporary partial disability compensation from August 24, 2000 at the rate of $220.03 per week for a period not to exceed five years consistent with the limitations of section 8(e) of the LHWCA. *Crowley II* at 9-12.

The case is now back before the OALJ a third time. Subsequent to *Crowley II*, The Claimant sought to modify his compensation award to permanent partial disability compensation from August 7, 2003 based on a continuing permanent disability caused by the shoulder injury. Logistec also moved to modify the *Crowley II* award based on its contention that the Claimant

had returned to work as a longshoreman on August 16, 2004 with earnings in excess of his pre-injury average weekly wage. The Claimant additionally filed a separate claim to obtain medical care for a work-related back condition. The parties were unable to resolve these issues during informal proceedings before the Office of Workers' Compensation Programs ("OWCP"), and the OWCP transferred the case to the Office of Administrative Law Judges for a formal hearing pursuant to section 19(d) of the LHWCA.

The hearing was convened on March 31, 2005, and a second day of hearing was conducted on July 19, 2005. The Claimant appeared at the hearing represented by counsel, and an appearance was made on behalf of Logistec and its workers' compensation insurance carrier, Signal Mutual Indemnity Association (Signal). The Claimant testified at the hearing, and documentary evidence has been admitted as Claimant's Exhibits ("CX") A-E and Employer Exhibits ("EX") 1-6.[2] The parties also offered stipulations which were admitted as Joint Exhibit ("JX") 1. The record was held open at the request of both parties to allow for offers of additional evidence and the filing of post hearing briefs. Pursuant to this ruling, the following post-hearing exhibits have been admitted without objection:

Deposition of the Claimant (September 7, 2005)	CX F;
Report from Dr. Browning (September 7, 2005)	CX G;
Report from Dr. Browning (September 13, 2005)	CX H;
Pay Statement from First Step, Inc. (October 15, 1999)	CX I;
Federal and State Court Documents	EX 7;
Labor market Survey (August 24, 2005)	EX 8;
Application for Section 8(f) relief (June 2, 2004)	EX 9;
Deposition of Micaela Black (September 7, 2005)	EX 10;
Deposition of Dr. Browning (October 24, 2005)	EX 11; and
Deposition of Dr. Willetts (November 16, 2005)	EX 12.

The parties were allowed until January 31, 2006 to file post-hearing briefs which were received from both parties. The record is now closed.

After careful analysis of the evidence contained in the record, and after consideration of the parties' arguments, I conclude that the Claimant is entitled to have his award modified to provide for permanent partial disability compensation, medical care and attorney's fees. I further

[2] Logistec's objection to a portion of CX E (namely, the third paragraph on page 2 of a June 17, 2005 letter from S. Pearce Browning, III, M.D.) was resolved by the Claimant's agreement to offer the exhibit without the offending paragraph. Hearing Transcript at 73-74.

find that Logistec is entitled to liability relief from the Special Fund. My findings of fact and conclusions of law are set forth below.

II. The Claims, Stipulations and Issues Presented

In Case No. 2005-LHC-00169, OWCP No. 01-157280, the Claimant seeks disability compensation from Logistec for a loss in earning capacity caused by a work-related shoulder injury that he sustained on August 24, 2000. In Case No. 2005-LHC-00957, OWCP No. 01-148538, the Claimant seeks an order that Logistec provide certain medical testing that his orthopedic specialist, Dr. Browning, has requested for an October 31, 1999 work-related back injury.

With respect to Case No. 2005-LHC-00169, the parties have offered the following stipulations: (1) the LHWCA applies to the claim; (2) the injury occurred on August 24, 2000 at New London, Connecticut; (3) the injury arose out of and in the course of the Claimant's employment with Logistic; (4) there was an employer-employee relationship at the time of the injury; (5) Logistec was timely notified of the injury, and the claim and notice of controversion were timely filed; (6) the informal conference was held on May 26, 2004; (7) the Claimant's average weekly wage at the time of the injury was $848.37; (8) the Claimant was paid temporary partial disability compensation from August 24, 2000 at the rate of $220.03 per week; (9) medical benefits have been paid; (10) the Claimant was temporarily partially disabled from August 24, 2000 to August 6, 2003, and he has been permanently partially disabled from August 7, 2003; (11) the Claimant reached maximum medical improvement on August 7, 2003; (12) the Claimant has not returned to his usual job; and (13) the Claimant has engaged in alternate employment at Logistec from August 16, 2004. JX 1. The parties further stipulated that the unresolved issues in presented by this claim are: (1) the extent of the Claimant's disability and, specifically, the dollar amount of the compensation that he is entitled to under section 8(c)(21) of the LHWCA since August 16, 2004; (2) whether Logistec is entitled to liability relief pursuant to section 8(f) of the LHWCA; and (3) whether the Claimant is entitled to an award of attorney's fees. *Id.* Although the Claimant stipulated that the disability compensation issue concerns the dollar amount of the section 8(c)(21) permanent *partial* disability compensation he should receive from August 16, 2004, he asserts in his post-hearing brief that he is entitled to permanent *total* disability compensation for the period of August 17, 2004 to August 1, 2005 because the work that he performed at Logistec between these dates constituted sheltered employment provided by a beneficent employer. Claimant Brief at 8-10.[3]

With respect to Case No. 2005-LHC-00957, the parties have offered the following stipulations: (1) the LHWCA applies to the injury which occurred on October 31, 1999 at New London, Connecticut; (2) the injury arose out of and in the course of the Claimant's employment with Logistic; (3) there was an employer-employee relationship at the time of the injury; (4) Logistec was timely notified of the injury, and the claim and notice of controversion were timely filed; (5) there was no informal conference as the case was joined by agreement of the parties; (6) Logistec has authorized an MRI of the lumbar spine only; and (7) the issue presented is

[3] The Claimant's LS-18 and pre-hearing statement identify his claim as one for permanent partial disability compensation. *See* Administrative Law Judge Exhibits 1 and 9.

whether MRI studies the cervical and thoracic spines and blood testing requested by Dr. Browning constitute reasonable medical care. Hearing Transcript ("TR") at 78-80.[4]

III. Findings of Fact and Conclusions of Law

A. Developments since Crowley II

At the time of the hearing before Judge Geraghty on July 15, 2003, the Claimant had not returned to work at Logistec since 2000, and he continued to be employed in his full-time job as a mental health worker/counselor at First Step. On or about September 15, 2003, the Claimant's employment at First Step was terminated for alleged misconduct. EX 7; TR 89-90. The Claimant testified that he was having some difficulty with performing certain tasks at First Step due to his physical limitations, but he agreed that First Step had accommodated his limitations and that he was performing the requirements of his regular job as mental health worker/counselor job at the time that he was fired. TR 87-88, 91-92.

On August 16, 2004, Logistec wrote to the Claimant, stating that it was offering him a light duty assignment in the guard house beginning August 16, 2004 at the rate of $12.00 per hour, Monday through Friday, 8:30 a.m to 3:00 p.m. CX C. The Claimant reported to Logistec and worked for about five weeks guarding a gate. TR 32. He testified that the Coast Guard then informed Logistec that the gate did not need to be guarded, and his assignment was changed to help out around the yard, picking up lumber, banding and trash, running errands, and doing some carpentry, painting and masonry work. TR 32-33, 35-38. He continued to receive $12.00 per hour for six hours per day with no benefits and no paid holidays. TR 33-34. The Claimant testified that he was the only employee working on the pier who did not receive the union wage rate of $16.50 for yard work. He also testified that he had asked Logistec to be put back on his regular job as a longshoreman but was informed that there was no job for him. TR 39. Logistec's Operations Manager, Jeff Ryalls, testified at a deposition that the work that the Claimant performed after he was transferred from guarding the gate is necessary work that is usually done by union members. EX 5 at 5-6, 8-9.

The Claimant further testified that filed a grievance, as well as an unfair labor practice charges with the National Labor Relations Board, against both the union and Logistec in an effort to be paid at the union wage rate after the local union business agent called him a "scab". TR 82-83, 93-94; EX 1. After the grievance was filed, Logistec instructed him to no longer perform yard work and resume guard duty at the gate. TR 82. He described this assignment as sitting in a truck and listening to the radio or reading the paper at an unused gate. TR 84. The Claimant performed the guard duty for about two weeks until he was notified by letter dated May 17, 2005 from Logistec that his "light duty" position was "no longer available, effective immediately." CX D; TR 81. The May 17, 2005 letter went on to explain that the light duty assignment, which was intended to be temporary pending the Claimant's return to full duty, was no longer considered appropriate since the Claimant's "medical restrictions may be permanent, and your return to employment as a longshoreman is doubtful." *Id.*

[4] The parties' reference to an imaging study of the cervical spine appears to be a misstatement as there is no evidence in the record that Dr. Browning requested a cervical MRI or x-ray.

The Claimant testified at a post-hearing deposition that he was hired on August 1, 2005 by Sharp Training, Inc. as a van driver for passengers with disabilities. CX F at 4. He was working approximately 35 hours per week at $10.50 per hour with no benefits, though he anticipated eventually receiving paid holidays and medical coverage. *Id.* at 5, 9. In his post-hearing brief, he concedes that he has a current wage-earning capacity of $378.00 per week based on this employment. Claimant's Brief at 16.

B. Is Logistec liable for the medical testing requested by Dr. Browning?

The parties agree that the Claimant injured his back while working for Logistec on October 31, 1999 and that he is entitled to have Logistec provide reasonable and necessary medical care for this injury pursuant to section 7 of the LHWCA. They also stipulated that Logistec has agreed to pay for an MRI examination of the Claimant's lumbar spine per the recommendation of Dr. Browning. What is in dispute is Dr. Browning's request that Logistec authorize additional testing. The origin of this controversy is found in Dr. Browning's September 16, 2004 report on his evaluation of the Claimant's back injury. CX E at 15-16.[5] After discussing the Claimant's history, examination and past medical reports, Dr. Browning requested authorization for x-rays of the thoracic and lumbar spine, sacrum and pelvis. *Id.* at 16. He noted that a MRI study on December 1, 1999 showed "significant disc pathology" including bulging discs at L4-5 and L5-S1, and he stated that the Claimant could have suffered significant damage to the thoracic spine, which had not previously been x-rayed, due to the slip and fall accident. *Id.* He also requested authorization for laboratory studies to properly evaluate the Claimant's loss of sensation in his legs. *Id.* In a letter dated June 17, 2005, Dr. Browning explained that the only imaging study available was from 1999 and that he was concerned that the Claimant's "L4 disc may have extruded far enough backwards into the dural canal so that there is extensive spinal stenosis which is responsible for the marked neurological loss" which he described as the worst he had seen in the last 20 years. CX E at 1. Dr. Browning further explained that he had requested the laboratory work to investigate other possible causes of the Claimant's neuropathy, and he stated that he needed to take all of the Claimant's health problems into consideration in order to properly advise him on treatment options:

> This is why the laboratory is reasonable and necessary. It is necessary to have a complete picture of this individual's situation, both from the standpoint of the injury and any other conditions which may be affecting that injury in order to properly advise him as to what he should do.

Id. at 2. Logistec did eventually authorize the lumbar MRI study which was done on August 19, 2005. Dr. Browning reviewed the radiologist's report and re-examined the Claimant on August 26, 2005. In a letter dated September 7, 2005, Dr. Browning stated that the MRI showed foraminal stenosis which was not present on the previous study and that it was his opinion that

[5] In his report, Dr. Browning describes a series three back injuries: first, a slip on ice during the winter of 1999; second, while lifting a heavy plank in late 1999 or 2000; and third, when he was "shoved . . . into a hutch" by a patient at half-way house in 2004. CX E at 15. Dr. Browning also reported that the Claimant had trouble remembering the details of these injuries, and he stated that he did not think that the 2004 injury at the half-way house had "any long-term significance." *Id.* In any event, I have accepted the parties' stipulation that the Claimant suffered a work-related back injury at Logistec on October 31, 1999.

the Claimant suffered from ongoing degenerative changes at L4-5 and L5-S1 with protrusion in the right L5-S1 foramina as a result of his back injury. CX G at 2. Based on the MRI results, Dr. Browning stated that he would not recommend surgery at this time, and he stated that he still needed the x-rays of the Claimant's back and hips as well as the laboratory work in order to "assess the whole person" and advise the Claimant regarding future medical management of his condition. *Id.* at 3. Dr. Browning also reviewed a May 18, 2005 report from Dr. Willetts (EX 6, discussed *infra*) and stated that that Dr. Willetts's normal sensory and hip motion findings were contradicted by his findings which showed some improvement from January of 2005 but not normal responses. *Id.* at 2-3.

Dr. Browning testified at a deposition taken on October 24, 2005. EX 11. He is licensed to practice medicine in Connecticut and last performed surgery in 1986. *Id.* at 6-7. Currently, his practice is limited to seeing one to two patients per month. *Id.* at 7. He testified that he has requested a "comprehensive chemistry profile, arthritis profile, thyroid with TSH, RPR screen, Vitamin B12, folic acid, glycohemoglobin, CBC, ESR, C-reactive protein, HLA-B27 and VDRL" in the Claimant's case. *Id.* at 9. He explained that each of these tests is used to diagnose medical conditions which could be contributory to the Claimant's neuropathic symptoms in his lower extremities, and he agreed that with these tests he is primarily looking for conditions that may not be related to the Claimant's back injury but which could also produce symptoms similar to those caused by a back injury. *Id.* at 9-14, 33.[6] However, he reiterated his opinion that proceeding to treat the Claimant without the requested testing would not constitute proper treatment, proper evaluation or proper management. *Id.* at 43.[7] Dr. Browning also testified that he was surprised when he read the report from Dr. Willets who did not find any sensory deficit because "Dr. Willetts is usually very thorough and quite reliable." *Id.* at 35. For that reason, he decided to re-examine the Claimant on August 26, 2005, and he testified that he found that the Claimant's sensory deficits were still present at the later examination, though they had improved from January of 2005. *Id.* at 35-36, 30-31.

Dr. Willetts examined the Claimant on May 18, 2005 and reviewed his medical records. In a 26-page report issued on that date, he diagnosed the Claimant with multiple conditions including an initial work-related back injury from a fall on ice on January 14, 1999 with a worsening of low back pain on November 10, 1999 following truck driving work. *Id.* at 21-22. He stated that a further MRI study of the Claimant's lumbar spine would be a "reasonable elective option if Mr. Crowley were to deteriorate neurologically or desire aggressive treatment for his back." *Id.* at 23. However, he disputed the necessity of the additional testing requested by Dr. Browning:

> On rare occasions, laboratory tests will show a non-work-related disease that is the sole cause of back problems. It is highly unlikely that such testing will show this in Mr. Crowley, who does have credible evidence of reporting a work injury January 13, 1999, and some ongoing low back pain thereafter.

[6] The Claimant's objections to the use of leading questions by Logistec's attorney during his examination of Dr. Browning are overruled. *See* 29 C.F.R. § 18.611(c) (2004).

[7] Logistec's objection to the question which elicited this testimony is overruled.

> In summary, the multiple laboratory studies suggested by Dr. Browning might be appropriate for a variety of non-related medical conditions but would not likely confirm or disprove a work injury, nor would they assist in treating any work-related injury claim presented by Mr. Crowley. There is certainly no harm in having them done for any possible non-work-related medical treatment that might result, but they would not be for work-related conditions.

Id. at 23. Dr. Willetts's testimony was taken at a deposition on November 16, 2005. EX 12. He has been board-certified in orthopedics since 1979. *Id.* at 4. He is licensed in Connecticut and Rhode Island and is on the active staff of the Westerly (Rhode Island) Hospital. *Id.* at 5. He testified that the RPR screen ordered by Dr. Browning is for syphilis, which the Claimant does not have, and that all of the tests requested by Dr. Browning "have "nothing to do with work-relatedness of his conditions." *Id.* at 23-24. Dr. Willetts further testified that if the Claimant needed any of the requested tests, a proposition that he found highly questionable, they should have been ordered "a long time ago by the primary care physician." *Id.* at 25. He did, however, acknowledge that several of the conditions targeted by the requested tests are capable of producing neurological symptoms similar to those reported by the Claimant. *Id.* at 42-44. He also agreed that the tests would rule out other possible causes of the Claimant's symptoms and that "[n]o one ever likes to be accused of missing a diagnosis." *Id.* at 45.

Section 7(a) of the LHWCA provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a). The regulations implementing section 7(a) provide that medical care includes "laboratory, x-ray, and other technical services . . . recognized as appropriate by the medical profession for the care and treatment of the injury or disease." 20 C.F.R. § 702.401. The burden is on the Claimant to establish that medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1138 (1981). A claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Turner v. Chesapeake and Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). If medical treatment is in part necessitated by a work-related condition, the entire cost of the treatment is compensable. *Turner*, 16 BRBS at 258. *See also Kelley v. Bureau of National Affairs*, 20 BRBS 169, 172 (1988).

I find that the Claimant has met his burden of establishing that the additional x-rays and laboratory studies requested by Dr. Browning constitute appropriate medical care for his work-related back injury. While Dr. Willetts states that these additional studies are diagnostic of conditions unrelated to the back injury, a point readily conceded by Dr. Browning, he does not contradict Dr. Browning's explanation that the tests are appropriate for ruling out the presence of other medical conditions that could be causing or contributing to the Claimant's back and lower extremity symptoms. Dr. Willetts also did not contradict Dr. Browning's thoroughly reasonable explanation that it is medically necessary to rule out other potentially contributory causes before

he can make informed recommendations to the Claimant on treatment options. In fact, he tacitly agreed that it is prudent medicine to rule out all other potential contributory conditions. For these reasons, I conclude that Logistec is responsible under section 7 for providing the Claimant with the additional testing requested by Dr. Browning. *See Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998) (although an employer "is not required to pay for unreasonable and inappropriate treatment, when the patient is faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny."), *amended*, 164 F.3d 480 (9th Cir. 1999). In making this determination, I emphasize that Logistec is responsible only for the tests requested by Dr. Browning and not for *treatment* of any medical conditions diagnosed by these tests in the absence of evidence establishing a causal connection between the condition and the Claimant's employment.

C. Nature and Extent of the Claimant's Disability

Two issues are presented. First, as to whether the Claimant's disability has become permanent, the parties have stipulated that the Claimant reached a point of maximum medical improvement on August 7, 2003 and that he has been under a permanent partial disability since that date. The second issue, on which the parties are in sharp disagreement, concerns the dollar amount of disability compensation the Claimant is entitled to receive. There are three periods to be considered: (1) August 7, 2003 to August 15, 2004 when the Claimant did not work at Logistec; (2) August 16, 2004 to May 16, 2005 when he earned wages at Logistec; and (3) May 17, 2005 to the present. As a preliminary matter, it is essential to bear in mind when considering these three periods that the Claimant's past compensation awards were partial, even for the periods when he was not working for Logistec because of the fact that he continued to perform his regular job as a mental health worker for First Step. Thus, any loss of earning capacity attributable to injuries sustained at Logistec was partial, not total. Though the Claimant is no longer working for First Step, the record shows that he was terminated for alleged misconduct, and there is no claim that his loss of wages from the First Step job was caused by his compensable injuries at Logistec. In addition, the Claimant has now replaced the First Step job, albeit at lower wages, with regular employment as a disabled van driver. Consequently, I agree with Logistec that any determination of the Claimant's compensable losses must be based on the difference between his pre-injury wages from Logistec and his post-injury wage-earning capacity.[8] That is, the change in the Claimant's economic status due to the termination of his employment at First Step is irrelevant because his termination from this job is not attributable to workplace injuries arising out his employment at Logistec. *See Suppa v. Lehigh Valley R.R. Co*., 13 BRBS 374, 376 (1981) (the LHWCA provides payment for work-related disability, not compensation for periods when an employee is laid off from work for reasons unrelated to employment injuries).

1. August 7, 2003 to August 15, 2004

This period is uncontroversial. The Claimant earned no wages from Logistec, and there is no contention that suitable alternative employment was available. Logistec concedes that the Claimant is entitled to permanent partial disability compensation for this period at the rate of $220.03 per week based on lost wages of $330.04 per week as determined in *Crowley II*.

[8] The Claimant has not offered any contrary argument.

Logistec Brief at 8. Accordingly, I find that the Claimant is entitled to receive permanent partial disability compensation pursuant to section 8(c)(21) of the LHWCA at the rate of $220.03 per week commencing August 7, 2003 and continuing at least through August 15, 2004.

2. August 16, 2004 to May 16, 2005

Logistec contends that the Claimant should continue to receive section 8(c)(21) compensation after August 16, 2004 but that the rate should be adjusted to reflect his earnings from employment at Logistec. Logistec Brief at 8-9. The Claimant counters that he is entitled to "permanent total disability" compensation for this period (and continuing until August 1, 2005 when he commenced employment with Sharp Training as a disabled van driver) because the work that he performed for Logistec constitutes sheltered employment provided by a beneficent employer, and because Logistec failed to establish the existence of suitable alternative employment prior to April of 2005. Claimant Brief at 9-12.[9]

Generally, an offer of light duty work within an injured worker's restrictions satisfies an employer's burden to demonstrate the availability of suitable alternative employment provided that the work is necessary and not merely the creation of a beneficent employer. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986); *Swain v. Bath Iron Works Corp*., 17 BRBS 145, 147 (1985). The Board has recognized that an exception exists where evidence establishes that a worker's post-injury earnings are the product of "beneficent" or "sheltered" employment. *See CNA Insurance Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991) (affirming Board's finding of sheltered employment where claimant worked on an "as-needed basis, averaging only approximately ten hours per week at the job, and he had a mattress in the office so that he could lie down during the day."); *Patterson v. Savannah Machine & Shipyard*, 15 BRBS 38, 42-43 (1982) (substantial evidence supported ALJ's finding that claimant's post-injury earnings were not merited by his services but rather were the product of beneficent or sheltered employment where testimony showed that he was treated with "kid gloves" and would not necessarily be replaced if his job were terminated); *Walker v. Pacific Architects & Engineers*, 1 BRBS 145, 147-48 (1974) (finding of total disability affirmed where evidence established that double amputee's post-injury work resulted from exceptional accommodations made by "an understanding, cooperative and sympathetic employer"). *See also Harrod v. Newport News Shipbuilding & Dry Dock Co*., 12 BRBS 10, 13-14 (1980) ("Sheltered employment may be said to occur, for example, when claimant is physically incapable of performing the duties required by his job but nevertheless receives wages, or where the job is unnecessary to employer's operations and merely created in order to place claimant on the payroll."). However, the Board has cautioned against a broad application of these cases and has emphasized that circumstances which warrant an award of total disability, concurrent with a period where the claimant is working, are the exception rather than the rule. *Shoemaker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 141, 145 (1980).

Applying these principles to the facts of the instant case, I find that the work performed by the Claimant at Logistec from August 16, 2004 through May 16, 2005 did not constitute sheltered or beneficent employment. The record does not indicate that Logistec is a particularly "understanding, cooperative and sympathetic" employer, and, with the exception of the gate

[9] The earliest labor market evidence introduced by Logistec is dated April 20, 2005. EX 2.

security duties that the Claimant performed at the beginning and end of his "light duty" employment period, the record shows that the work he did in cleaning up debris and maintaining facilities is necessary work that is regularly performed by other employees. Logistec's decision not to pay the Claimant at the union wage rate under the collective bargaining agreement or the fact that it made some effort to tailor the work to the Claimant's limitations does convert the job to beneficent or sheltered employment as long as the work performed is necessary. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986).

The Claimant earned $360.00 per week from August 16, 2004 to May 17, 2005 when Logistec terminated his employment. Since these earnings exceeded the Claimant's pre-injury average weekly wages from his employment at Logistec, I find that he has not shown that he suffered any loss of wage-earning capacity during this period that is attributable to his work-related injuries at Logistec. Therefore, he is not entitled to any compensation between April 16, 2004 and May 16, 2005.

3. May 17, 2005 to the Present.

Logistec has introduced labor market research dated April 20, 2005 from a vocational expert who concluded that the Claimant has a present wage-earning capacity for security, cashier or clerical work at weekly wages ranging from $280.00 and $440.00 on a full-time basis. EX 2. The Claimant asserts that his earnings from the job that he started on August 1, 2005 as a disabled van diver represent his actual wage-earning capacity, and he contends that Logistec's labor market evidence should be rejected because it is based on a premise, contradicted by Dr. Browning, that he is capable of working up to 60 hours per week, and because Logistec's vocational expert was unable to identify any jobs that would be available to the Claimant at night so as to permit him to work a second job in addition to his current regular work as a disabled van driver. Claimant Brief at 12-15.

Regarding the Claimant's capacity for work activities, Dr. Browning stated in his September 7, 2005 report that he did not believe that the Claimant could work 60 hours per week. CX G at 3. Rather, he stated that the Claimant's limit is 40 hours per week, noting that he was then working about 32 hours per week as a disabled van driver and that he had not worked more than 40 hours per week for several years. *Id.* Logistec cross-examined Dr. Browning about the basis for this opinion at his deposition. He responded that the medical basis for his opinion that the Claimant is limited to 40 hours work per week is the Claimant's "history, physical examination, review of all medical records, and discussing with Mr. Crowley what he can do and what he can't do, which comes under history." EX 11 at 28-29. He was pressed further:

> Q. And, Doctor, as long as Mr. Crowley is working within the restrictions outlined in your form on January 21st of 2004, what specifically prevents him from doing that for, let's say, 60 hours instead of 40 hours as long as he's within the restrictions?
>
> A. I checked [Number] 18 on that form, which states specifically limited to 8 hours.

Q. How about six days a week?

A. I don't think I would want to push Mr. Crowley to six days a week, but that wasn't in the form.

Q. What is the medical basis for Mr. Crowley not being able to work six days a week if he has been working six days a week for most of his adult life?

A. At this point, he hasn't, to my knowledge, been working six days a week for the last three or four years. And, based on my discussion with him on 8/26/2005, I don't think he could work six days a week.

Q. Doctor, that's even if his work is all within the physical limitations you've outlined?

A. Yes. I think he's doing very well to manage 30 to 35 hours a week, much less 40.

Id. at 29. Dr. Browning further testified that the Claimant is not limited to rest for periods outside of the time that he is working, but he added that the Claimant should be guided by the work restrictions in his non-occupational activities. *Id.* at 29-30. However, he testified that the fact that the Claimant is not strictly limited to rest outside of his work hours does not suggest that he has a capacity for working more than 40 hours per week, and he reiterated his assessment that the Claimant is fortunate to be able to sustain his present level of work. *Id.* at 30. He also stated that although the Claimant's condition improved between January and August of 2005, he did not believe that the improvement would allow modification of the Claimant's restrictions including the limit on the Claimant not working more than 40 hours per week. *Id.* at 30-31.

Dr. Willetts testified that his examination of the Claimant revealed some evidence of symptom magnification with respect to the Claimant's complaints of upper and lower extremity symptoms and no objective evidence of lower extremity sensory problems. EX 12 at 12-17. However, he also testified that he found that the Claimant had a "clearly absent left knee deep tendon reflex . . . [which is] clear objective evidence of radiculopathy . . . a dysfunction of one of the spinal roots that goes down the legs." *Id.* at 17-18. He also said that his examination revealed some signs of shoulder impingement and that it is his opinion that the Claimant's shoulder and back injuries both limit the Claimant's ability to work. *Id.* at 20-21. He further testified that it is his opinion that the Claimant would be able to work in a "supervisory position at First Step were he not terminated" and that "[h]e would be limited by the specific activities, weights and stresses during the time he works, but there is no limit to the number of hours or days that he could work because of these conditions." *Id.* at 21-22. Under cross-examination by the Claimant's attorney, Dr. Willetts testified that he had taken all of the Claimant's conditions into consideration in forming his opinions on the Claimant's work capacities, and he insisted that the Claimant's decision to reduce his working hours is a function of age and motivation and not his work-related disabilities. *Id.* at 35-36, 39-41.

Logistec's vocational expert, Micaela Black, testified at her post-hearing deposition that she was asked by Logistec to review her labor market survey and identify any jobs that would be available on a part-time basis of 20 hours per week. EX 10 at 5-6. She said that she considered part-time work totaling 20 hours per week because the Claimant had worked approximately 60 hours per week prior to his injury. *Id.* at 11. She also testified that she would not, as a vocational expert recommend working more than 60 hours per week. *Id.* at 11-12. Ms. Black stated that she was able to identify jobs that would be available on a part-time basis, currently paying between $7.00 and $12.00 per hour, but she was unable to identify any part-time jobs that would be available to the Claimant at night, though she assumed that some would be available on night shifts. *Id.* at 10, 13-14. She also testified that prior to this case, she had never conducted a labor market survey to determine the existence of suitable jobs other than those which have a 40 hour per week schedule. *Id.* at 8.

Since Logistec does not contend that the Claimant can return to his usual or pre-injury employment as a longshoreman, it can only avoid liability for total disability compensation by producing evidence that suitable alternative employment is available in the Claimant's community. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-936 (2d Cir.1976).[10] To meet this production burden, Logistec "does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991), citing *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043 (5th Cir. 1981). This burden requires an employer to show the precise nature, terms and availability of any alternate jobs alleged to be suitable for an injured worker. *Thompson v. Lockheed Shipbuilding & Constr. Co*., 21 BRBS 94, 97 (1988) (*Thompson*), citing *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). Logistec has attempted though its vocational expert to establish that there are suitable part-time jobs available to the Claimant that would increase his wage-earning capacity above the $378.00 per week that he currently earns as a disabled van driver. However, Ms. Black conceded that she could not identify any part-time jobs with night shift hours that would be compatible with the Claimant's day job which falls short of its burden of demonstrating the "actual availability" of suitable alternative employment. *See Thompson*, 21 BRBS at 97.

Moreover, even if Logistec's labor market evidence is credited as sufficient to establish the availability of alternate part-time employment, this record does not support a finding that any part-time work, in addition to the Claimant's regular daytime job as a disabled van driver, would be suitable given the Claimant's current limitations. I base this conclusion on an assessment of the competing medical opinions offered by Drs. Browning and Willetts on the issue of whether the Claimant is capable of working more than 40 hours per week. As discussed above, Dr. Browning testified that he believes that the Claimant is at his medical limit working a single full-time job as a disabled van driver. Dr. Willetts, on the other hand, testified that there is no medical reason to place any cap whatsoever on the Claimant's hours of work.

[10] A claimant's "usual employment" consists of the regular duties that the claimant was performing at the time of the injury. *Ramirez v. Vessel Jeanne Lou, Inc*., 14 BRBS 689 (1982). At the time of his injury in 2000, the Claimant was employed by Logistec as a longshoreman.

Logistec argues that any conflict between the opinions offered by Drs. Willetts and Browning should be resolved by rejecting Dr. Browning's testimony as "biased toward the claimant, and against the employer." Logistec Brief at 15. Logistec additionally contends that Dr. Browning's opinions should carry less weight than those of Dr. Willetts because Dr. Browning has "largely retired from the practice of medicine" while Dr. Willetts "continues to be on the active staff at Westerly Hospital." *Id.* at 14-15. Logistec contends that Dr. Browning's alleged bias is evident in his responses to the above-quoted cross-examination during which Logistec asserts that he made "conclusory statements that he then [could] not logically support." *Id.* at 15. In my view, a finding of bias against an expert requires more than showing that the expert disagreed with opposing counsel's analysis, and I find Dr. Browning's testimony on the Claimant's work endurance no more conclusory and no less supported than Dr. Willetts's opinion that the Claimant has an unlimited capacity for work hours. As for Dr. Browning's semi-retirement, it is true that he has not held hospital privileges for 20 years. However, the reliability of his opinions in this case depends not on his ability or willingness to wield a scalpel or manipulate an arthroscope but rather on the quality of his medical analysis. Suffice it to say that Logistec has not shown that advancing age, even when accompanied by a diminution of physical capabilities, is sufficient to support an inference that a physician's ability to render medical diagnoses and assess medical limitations has been compromised.

As to the merits of the conflicting opinions on the Claimant's stamina for work, I find it noteworthy that Dr. Willetts appears to have largely based his opinion a single examination which reportedly produced evidence of symptom magnification and relatively benign objective findings in relation to the findings reported by Dr. Browning. In contrast, Dr. Browning's records reflect that he examined the Claimant on three separate occasions including the follow-up examination in August of 2005 which he specifically performed to investigate discrepancies between his findings and those reported by Dr. Willetts. While Dr. Willetts is a highly qualified expert who submitted an impressively thorough report, I am persuaded that Dr. Browning's opinion that the Claimant is limited in the number of hours that he can work is better reasoned and more consistent with the totality of the medical evidence than Dr. Willetts's opinion that the Claimant can work unlimited hours despite the accumulative effects of his multiple, partially disabling medical conditions and restrictions. In this regard, I note that Dr. Miller, the Claimant's treating orthopedic physician for his shoulder condition, reported in 2002 that the Claimant was better able to tolerate his symptoms since he had discontinued his second job as a longshoreman and was then only working in "less intense current employment as a mental health worker." CX at 4.

Since Logistec has not met its burden of establishing the existence of suitable alternative employment to ameliorate the Claimant's loss of earning capacity resulting from his inability to return to his usual employment as a longshoreman, I find that the Claimant is entitled to receive permanent partial disability compensation pursuant to section 8(c)(21) of the LHWCA at the rate of $220.03 per week for the period commencing on May 17, 2005 and continuing.

D. Entitlement to Special Fund Relief

As required by the LHWCA's implementing regulations at 29 C.F.R. § 702.321 (2004), Logistec filed an application for liability relief from the Special Fund while the claim was

pending consideration before the OWCP, and the District Director referred the claim to OALJ without making any determination on the application. Administrative Law Judge Exhibit 1. Section 8(f) of the Act limits an employer's liability for permanent partial disability, permanent total disability and death benefits to a period of 104 weeks, after which compensation liability is assumed by a Special Fund established pursuant to 33 U.S.C. § 944, when the worker's disability or death is not due solely to the injury which is the subject of the claim. 33 U.S.C. § 908(f); *Lawson v. Suwanee Fruit & Steamship Co*., 336 U.S. 198, 200 (1949). The first two substantive requirements for obtaining Special Fund relief are: (1) the worker must have had a pre-existing permanent partial disability; and (2) the pre-existing disability must have been manifest to the employer. *Director, OWCP v. General Dynamics Corp*., 982 F.2d 790, 793 (2nd Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305 (2nd Cir. 1992). In cases involving a permanent partial disability, the employer must also show the worker's disability is "materially and substantially" greater than would have resulted from the subsequent injury alone. 33 U.S.C. § 908(f)(1).

Prior to the August 24, 2000 traumatic injury to the shoulders which forms the basis of the claim for permanent partial disability compensation, the Claimant had several other medical conditions. Logistec introduced records from William Wainright, M.D. which establish a history of prior problems with carpal tunnel syndrome for which Dr. Wainright assigned a permanent partial impairment rating. EX 9, Attachments F, G. Records from the Occupational Health Center demonstrate the presence of degenerative disc disease at L5-S1 and multi-level degenerative disc changes were seen on MRI on February 8, 1999. *Id.* at Attachment A. The reports and deposition testimony of Robert Ciotola, M.D. establish an underlying history of restriction from shoulder difficulty prior to August of 2000 and that there was treatment and probable impairment from psychological factors. *Id.* at Attachments C and D. Additionally, records from Connecticut Behavioral Health document the Claimant's history of underlying psychological problems. *Id.* at Attachment B. Although the Claimant may not have suffered any permanent loss of pay as a result of these pre-existing conditions, a "disability" for section 8(f) purposes encompasses not only those cases where a worker suffers an economic loss or fits within a statutory definition of disability, but those situations where an employee has "such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." *C & P Tel. Co v. Director, OWCP*, 564 F.2d 503, 513 (D.C. Cir. 1977); *Preziosi v. Controlled Industries*, 22 BRBS 468, 473 (1989). In my view, the Claimant's history of significant back, hand and psychological impairments requiring treatment are clearly serious conditions that could have motivated a cautious employer to discriminate against him so as to avoid incurring future liability. Therefore, Logistec has established that the Claimant suffered from pre-existing permanent partial disabilities.

The evidence also establishes that the Claimant's preexisting disabilities were manifest to Logistec because it had actual knowledge of the Claimant's back and hand conditions and because there were medical records in existence prior to the August 20, 2000 shoulder injury from which the nature and full extent of his preexisting psychological condition were objectively determinable. *See Esposito v. Bay Container Repair Co*., 30 BRBS 67, 68 (1996). Therefore, I find that Logistec has demonstrated that the Claimant's pre-existing disabilities were manifest within the meaning of section 8(f).

The third criterion for section 8(f) relief was addressed by Dr. Willetts. Dr. Willetts stated that the Claimant's pre-existing back condition requires him to avoid frequent and repetitive bending and twisting, frequent lifting, any lifting more than 35 pounds, working under low ceilings and in tight compartments. EX 6 at 22. He further stated that the Claimant's pre-existing bilateral hand impairment precludes repetitive use of the hands, use of vibrating tools, and rapid, repetitive, forceful hand exertion. *Id.* at 25. Noting the Claimant's long history of hand neuropathy and his documented back injury well before the first manifestation of the left shoulder complaints, and the long history psychiatric issues, Dr. Willetts stated the Claimant's shoulder injury is not the sole cause of his current and that his "restrictions from working are materially and substantially greater because of the combination of the hand, shoulder and back than they would be from the shoulder alone." *Id.* at 26. Based on this uncontradicted medical opinion, I find that Logistec has established that the Claimant's pre-existing, manifest disabilities make his current disability materially and substantially greater.

On the basis of my findings that Logistec has established all elements required for an award of Special Fund relief, I conclude that its liability for permanent partial disability compensation is limited to the statutory period of 104 weeks. *See Adams v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 78, 86 (1989). The 104-week period shall run from August 7, 2003 through August 15, 2004 (53 weeks) and from May 17, 2005 for an additional 51 weeks.

E. Entitlement to Attorney's Fees

The Claimant, having utilized an attorney to successfully establish his right to additional compensation, is entitled to an award of attorney's fees under section 28 of the LHWCA. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976). The Claimant's attorney will have 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132, and Logistec Carrier will have 15 days from the filing of the fee petition to file any objection.

IV. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

(1) Logistec of Connecticut, Inc. and its insurance carrier, Signal Mutual Indemnity Association, shall pay the Claimant Patrick W. Crowley permanent partial disability compensation at the rate of $220.03 per week from August 7, 2003 through August 15, 2004, and from May 17, 2005 and continuing, for a total period of 104 weeks;

(2) Commencing upon expiration of the 104-week period described above in paragraph (1) of this order, and continuing until further order, the Special Fund shall pay the Claimant permanent partial disability compensation at the rate of $220.03 per week;

(3) Logistec of Connecticut, Inc. and its insurance carrier, Signal Mutual Indemnity Association, shall provide the Claimant with the medical testing requested by Dr. Browning in his April 1, 2005 letter to Logistec's attorney's (*see* CX E at 3);

(4) The Claimant's attorney shall have 30 days from the date of this order in which to file an application for attorney's fees, and the Respondents shall have 15 days from the date of service of the application to file any objection; and

(5) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts